

Proceeding: IMPLEMENTATION OF SECTION 255 OF THE TELECOMMUNICATIONS ACT Record 1 of 1

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DOCKET FILE COPY ORIGINAL

Address Line 1: 1155 Connecticut Avenue, N.W

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City: Washington

State: DC

Zip Code: 20036 Postal Code: 4306

Submission Type: RC Submission Status: ACCEPTED

Viewing Status: UNRESTRICTED

Subject:

DA Number:

Exparte Late Filed:

File Number:

Calendar Date Filed: 08/14/1998 8:37:02 PM

Date Disseminated:

Filed From: INTERNET

Official Date Filed: 08/14/1998

Date Released/Denied:

Initials:

Confirmation # 1998814445861

Date Filed:

RECEIVED

AUG 14 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

98-198

8/14/98

INTERNET FILING

10/1/98
10/1/98

Before the
Federal Communications Commission
Washington, D.C.

In the Matter of)	
Implementation of Section 255 of the)	
Telecommunications Act of 1996)	
Access to Telecommunications Services,)	WT Docket No. 96-198
Telecommunications Equipment, and)	
Customer Premises Equipment)	
by Persons with Disabilities)	

SUMMARY OF
REPLY COMMENTS OF THE AMERICAN FOUNDATION FOR THE BLIND

Section 255 establishes affirmative obligations on the part of service providers and equipment manufacturers to make their respective products accessible to persons with disabilities if "readily achievable." Accordingly, in the NPRM, the Commission proposed to adopt guidelines developed by the Access Board that would provide clear guidance for implementing the statute's mandate. While AFB did not believe that the NPRM went quite far enough, it was certainly a step in the right direction.

By contrast, some commenters representing industry are asking the FCC to reject key elements of the Access Board's guidelines, in favor of guidelines and standards that are vague, unclear and insufficient. TIA asks the FCC to define accessibility to mean that equipment is accessible if any part of the equipment is accessible to any person with any disability. That is, a phone could be deemed accessible to the deaf if its input devices were accessible to those with impaired color perception. In addition, TIA and others ask the FCC to declare that it is only readily achievable to provide accessibility across product lines (a term that is never clearly defined). If such a test were adopted, combined with the accessibility test, this could mean that

the requirements of Section 255 would be discharged if a manufacturer made one product in a product line, some feature of which could be used by a person with a disability. AFB is also wary of comments that ask the FCC to import concepts from the ADA into the Section 255 rules, but in a way that is inconsistent with the ADA application of those concepts and inconsistent with Section 255. Perhaps most notable in this regard are proposals to import and then alter the ADA concept of “fundamental alteration” so that a covered entity can self-define the core functions of products or services in a manner that could allow the entity to escape accessibility obligations altogether.

Ultimately, the impact of what these commenters are seeking could lead the Commission to adopt a rule which would result in the development of narrowly targeted, specialized equipment, rather than encouraging development of products and services that are broadly accessible. What Section 255 requires is that person with disabilities have the same choices and opportunities to share in the telecommunications revolution as those who are not disabled.

While many comments are replete with anecdotes, those anecdotes really only suggest that it may not be possible to make each product accessible to every person with every disability. That is no justification for abandoning the goals of Section 255, however. Indeed, if the Commission requires development of an accessibility plan for implementing the Access Board guidelines, industry will begin to learn ways to incorporate accessibility features in products and across product lines, taking advantage of ongoing developments in memory, battery life and the like that make it simpler to add features.

Other proposed modifications to the definitions proposed in the NPRM would serve to undercut the goals of Section 255, and would be at odds with the clear language of the Act.

- Some commenters ask that accessibility obligations be limited to divisions within manufacturing corporations, thus effectively limiting what is “readily achievable.”

- Some commenters ask that the Commission adopt a cost recovery test that is impossible to apply.
- Some commenters seek to define the terms “telecommunications,” “telecommunications equipment” and “customer premises equipment” narrowly, in a manner inconsistent with the statute and with the purposes of Section 255.

In addition, several commenters ask the FCC to adopt procedural rules - statutes of limitation and standing requirements - that are neither necessary or appropriate given the purposes of Section 255, as AFB has shown. The FCC has full authority to hear complaints from all interested parties and to devise appropriate remedies for breach of Section 255, including damage remedies. Further - contrary to the comments submitted by many companies - the FCC should encourage the development of disabilities solutions by establishing an appropriate clearinghouse for information on accessibility.

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REPLY COMMENTS OF THE AMERICAN FOUNDATION FOR THE BLIND

I. THE COMMISSION MUST MOVE AGGRESSIVELY TO IMPLEMENT SECTION 255.

A. Experience Indicates That Strong Action Is the Only Way To "Ensure Accessibility."

There is an unfortunate tone in the initial comments filed by some companies and industry trade associations. These can be characterized as making two broad points (1) strong Commission action is not necessary, because the industry is providing access on its own, and will do so without government intervention; and (2) accessibility cannot be provided or even planned for except at great expense and enormous cost to the nation.¹ For the disability community, this is an old song: both before and after the adoption of the ADA, this community has heard that it is difficult to provide access, that more will be accomplished without government intervention; or, that nothing can be done so government should tread lightly ... etc. etc. A short visit to the Department of Justice ADA compliance website suggests that there is nothing novel about the claims being raised here, and nothing unique about the burdens that are

¹ See, e.g., *Strategic Policy Research Evaluation of the Access Board's Accessibility Guidelines*.

being placed on the telecommunications industry that would justify reading the requirements of Section 255 narrowly.

To the contrary, the telecommunications industry is now being asked to undertake an effort that many other industries undertook over a decade ago. The ADA recognized (among other things) that, as a simple matter of equity, public places had to be accessible to people with disabilities. In 1996, Congress extended the goals embodied in the ADA by recognizing that the telecommunications revolution had brought about a new type of public space: a virtual sphere to which access was just as critical as any physical structure. It is to the telecommunications industry's credit that this sphere has been created; but it is now the industry's responsibility --and the responsibility of the Commission -- to ensure that this sphere is accessible. While the prospect of requiring industry to achieve accessibility might seem frightening at this juncture, the AFB's experience with the ADA is a simple one: if the Commission requires accessibility, and makes it clear that it will move strongly to respond to complaints, access will be provided. If the Commission is unclear in its direction, industry will be encouraged to devote its efforts to legal avoidance rather than practical compliance. As AFB pointed out in its initial comments, this requires the Commission to look to the future, and to read Section 255 broadly, and not narrowly. And, it requires both the industry and disability community to recognize that accessibility and usability for people with disabilities is evolving and will improve as research, technical expertise and production methods begin to put a proper focus on the needs of these too long neglected consumers.

Many commenters alluded to advances in accessibility for people with disabilities brought about through the operation of a competitive marketplace.² While we appreciate the enormous advances made in telecommunications and information technology, and the degree to which many of those advances have, at least indirectly, benefited people with disabilities, we do

² *TIA Comments* at 2-3; *CEMA Comments* at 13; *Multimedia Telecommunications Association ("MTA") Comments* at 10, 12.

point out that the competitive marketplace has not ensured access for people who are blind or visually impaired. Modern telecommunications products are highly dependent on visual displays and rarely, if ever, provide audio output of the information shown on the visual display.

Indeed, many of the visual displays themselves are inaccessible to people with impaired vision because they are not sufficiently well-lit or customizable in terms of font size, contrast, character size etc. Increasingly, telecommunications devices employ touchscreens rather than tactually discernible, keys for input and control. While touchscreens are not necessarily impossible to make accessible for people who are blind or visually impaired, well-designed audio feedback is necessary to accomplish this accessibility.. Finally, although it is possible to design telecommunications products with communications ports to enable access by people with disabilities to a product's input and output via specialized, assistive technology, commercial devices rarely, if ever, include such ports or capabilities..

We are pleased to see some positive developments such as a greater effort by industry to provide accessible user manuals and other information in alternate formats. In addition, companies are beginning to seek opportunities to work with knowledgeable consumers who are blind or visually impaired and with knowledgeable organizations serving this population. However, in reviewing the comments in this docket, it is perhaps most important that the Commission keep in mind a recent quote from a case involving access to a sports stadium. In that case, the stadium owner and designer complained that they were being expected to consider design issues in an entirely different way than they had addressed those issues before. The court noted:

It is no answer to say this is the way we've always done it -- we've always discriminated against persons with disabilities. A prudent designer would have understood that, in enacting the ADA, Congress intended to do more than to simply maintain the status quo. Congress intended to establish higher standards for newly constructed structures, and to change the manner in which buildings were designed so that persons with disabilities could more fully share in the benefits that are available from public accommodations. Had Congress been satisfied with the status quo, there would have been no point in enacting the ADA.

Independent Living Resources v. Oregon Arena Corporation, 982 F. Supp. 698, 748 (U.S.D.C. Or. 1997).

It is true that, the FCC's proposed rules, and the Access Board Guidelines ask the telecommunications industry to think differently about design, development and fabrication issues. Understandably, that is something many wish to avoid; many argue against the FCC proposed rules and Access Board guidelines because they will require a different approach to the design and development of equipment or services. But, the proposed rules are not defective because they require a different approach to design, development and fabrication; they would be defective if they did not do so. To paraphrase Independent Living, had Congress intended to maintain the status quo, it would not have adopted Section 255.

B. The Commission Must Be Particularly Wary of Industry Requests That Would Write Section 255 Out of Practical Existence.

Several of the comments filed by industry representatives would have the effect of writing Section 255 out of the statute. Five positions are particularly notable.

1. The combination of the "accessibility," "product line," "fundamental alteration" and "cost recovery" tests proposed by some commenters would seriously thwart the goal of Section 255

TIA, Motorola and others, perhaps inadvertently, ask the Commission to approve a series of standards and definitions that would seriously undermine Section 255. These include: (a) a definition of accessibility that departs from Access Board guidelines; (b) a proposal for a product line to accessibility; and (c) a vague "fundamental alteration" test. Taken together and combined with the proposals for cost recovery in the definition of readily achievable, the effect is stunning.

Under the TIA definition of accessibility, "telecommunications equipment is accessible to the extent that it enhances the ability of a person with a disability to use...the equipment...by

incorporating one or more of the following features..."³ TIA incorporates the so-called 18-point checklist as the list of features. Providing any one of the features listed satisfies the accessibility requirement in toto. Further, the Commission is encouraged to interpret Section 255 as applying to people with disabilities as a "group." Applying this logic, a manufacturer could be considered to be in compliance under Section 255 if any one person with a disability can use a product.

It is also evident that as crafted, the equipment does not have to be fully accessible to anyone. For example, one satisfies the "features" test (and hence all accessibility obligations for all disabilities) by providing "at least one mode" for "input, control and mechanical functions" "that does not require user color perception." Output, display and control functions are treated separately, so that the equipment is deemed accessible as a whole under the TIA test even if the output, display and control of a device do require color perception. That is, under the TIA test, a product is accessible if it is partly accessible to a person with any disability.

Motorola's comments demonstrate quite clearly why the TIA definition makes no sense as a test of compliance. In discussing its "Pagewriter" paging system, Motorola argues that the Commission should not require it to incorporate features that would make the outputs accessible to people with impaired vision, even if that is "readily achievable," since the input device (the keyboard) would remain inaccessible (a position with which we disagree, since people who are blind or visually impaired are quite able to use keyboards, especially if simple, low-cost features such as a nib on the F and J key are included).⁴ *Motorola Comments*:

³ *TIA Comments* at 32

⁴ Motorola's comment is more persuasive as an argument against the Motorola/TIA tests than it is convincing as a reason for reading the term "readily achievable" to mean that accessibility is not required at all unless a device can be made totally accessible. To take the Pagewriter 2000 as an example: if the output were accessible to the vision-impaired, it might remain an extremely attractive product even if the keyboard input devices were not fully accessible, particularly given the ability of the device to generate preprogrammed responses, and the ability to dock the device to PCs and MACs, as described on the exhibits to the Motorola Comments. As pointed out above, simple additions to keep might make the keyboard accessible, but other limitations might be overcome by returning pages using a cellular or pay phone. Except in very limited

People with disabilities would not benefit if a manufacturer were to incorporate some access features into a product, but could not incorporate others that would make the product actually useable...It would be a waste of resources and a poor result for consumers with disabilities..."⁵

However, under the TIA accessibility test, this "poor result" would be all that Section 255 required: under the TIA "accessibility" definition, the Pagewriter 2000 would be deemed accessible to people who are vision impaired (because the Pagewriter could be partly accessible to the deaf).

As strange as that position is, it leads to even more ironic results when the "accessibility test" is combined with the vague "product line" that manufacturers propose.

Under the "product line" test, the Commission is encouraged to think of equipment in "groups"⁶ (though as we will argue elsewhere, no definition has been offered on the scope of product lines). A manufacturer will be deemed to have complied with its obligations under Section 255 if any piece of equipment in a product line is accessible.⁷ (We raise several serious concerns about product line in Part II of these comments.) As a result, because the Pagewriter was deemed "accessible," the entire product line would be deemed "accessible." No pager would need to be fully accessible, even if it were easy to make every pager accessible to large portions of the disabilities community.

circumstances (where two products are truly entirely fungible), making a device accessible increases choice for individuals with disabilities. That is one of the goals of disabilities legislation.

⁵ *Motorola Comments* at 17.

⁶ As pointed out *infra*, the Commission does not have the authority to read the statute to apply to "groups" of equipment. In this section, we will assume for the sake of argument that it does have that authority.

⁷ *Motorola Comments* at 7-8; 21-22.

Several commenters ask the FCC to import the fundamental alteration test from the ADA.⁸ This test is one that is difficult to import into the telecommunications context, since it ordinarily applies to a fundamental alteration to the "core function" of a facility and not to the ability of facility users to perceive those functions:

The ADA does not require a public accommodation to "fundamentally alter the nature" of the goods or services being provided... However, it is essential to accurately identify the principal goods or services that are being provided, and to distinguish them from (1) services that are merely collateral to the primary goods or services...and (2) the means for perceiving those services (e.g., hearing, seeing, closed captioning, assistive listening devices), both of which a public accommodation may, in some instances, be required to alter in order to facilitate use of the facility and receipt of the principal goods and services by persons with disabilities.⁹

The test proposed by TIA and Motorola is defined in a way so that core functions can be defined in part in terms of perception -- the way in which a message is to be sent and received. As a result, the obligations set out in Section 255 can be limited by simply defining what ends a product is meant to serve, in a manner that can have the effect of mandating inaccessibility. Even where a standard is not obviously tied to perceptions, the fundamental alteration test, as described, presents enormous problems in application. If a manufacturer assumes that size is a "core function," for example, then anything that increases size - even nominally - is not required. And, since every manufacturer has made it clear that the process of adding and detracting features involves some trade-offs, it is not difficult to imagine that any change to "battery life," "size," or "features" would be considered a fundamental alteration. Indeed, none of the examples given by industry provide any guidance as to how this standard could be applied in any practical way, and suggest that the exception would quickly swallow the rule. When combined with a vague "product line" and an insufficient definition of accessibility, this standard has the effect of allowing manufacturers to define certain individual products in a line as "inaccessible" by

⁸ *Motorola Comments* at 41-42; *TIA Comments* at 47-50.

⁹ Independent Living, 982 F. Supp. at n. 42.

definition, while satisfying Section 255 obligations by providing a limited number of devices with highly constricted accessibility

Several commenters ask the Commission to adopt what would be a fourth nail in the Section 255 coffin: tests that would permit manufacturers to improperly allocate or account for costs associated with providing accessibility in order to avoid producing accessible equipment. There are several variations on these tests. Some commenters want to allow manufacturers to refuse to produce accessible equipment if the manufacturer decides that the costs associated with providing accessibility could not be directly recovered. Under this model one envisions manufacturers assessing the market impact of special cost "pass-throughs" on individual pieces of equipment reminiscent of the universal service charges. If a manufacturer decided this extra charge would not be desired by consumers, the product wouldn't be produced. Another variation is to allocate all costs of providing accessibility to each division that produces a product, thus increasing the apparent cost of accessibility and making it appear that accessibility is not readily achievable.¹⁰ These and other variations all suffer from the same fatal flaw. It is obvious that every entity in a competitive market must strive to recover costs and earn a reasonable profit. However, ADA tests are not applied in a way that allows covered entities to recover costs of providing accessible facilities solely from individuals with disabilities, or to avoid providing accessibility on the ground that the accessibility feature will not pay for itself. Accessibility costs are costs that are intended to be shared across all products and by all consumers.¹¹ Under

¹⁰ *CEMA Comments* at 12; *USTA Comments* at 9-10; *Multimedia Telecommunications Association Comments* at 9. Not much better is the approach urged by TIA, under which the Commission is urged to adopt a "cost recovery" formula that would be almost impossible to apply in any sensible way, see *infra*.

¹¹ Indeed, the "group equipment" argument made by Motorola and TIA necessarily requires this result. Under this theory, the obligations of Section 255 are satisfied for all equipment by making some equipment accessible. It follows that the cost of accessibility is properly shared across the entire market for consumer electronics equipment and services, and not as special charges for particular devices. More to the point, because accessibility is a required feature of equipment, no different than the requirement that the equipment comply with applicable safety

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Before the
Federal Communications Commission
Washington, D.C.

In the Matter of)	
Implementation of Section 255 of the)	
Telecommunications Act of 1996)	
Access to Telecommunications Services,)	WT Docket No. 96-198
Telecommunications Equipment, and)	
Customer Premises Equipment)	
by Persons with Disabilities)	

REPLY COMMENTS OF THE AMERICAN FOUNDATION FOR THE BLIND

I. THE COMMISSION MUST MOVE AGGRESSIVELY TO IMPLEMENT SECTION 255.

A. Experience Indicates That Strong Action Is the Only Way To “Ensure Accessibility.”

There is an unfortunate tone in the initial comments filed by some companies and industry trade associations. These can be characterized as making two broad points (1) strong Commission action is not necessary, because the industry is providing access on its own, and will do so without government intervention; and (2) accessibility cannot be provided or even planned for except at great expense and enormous cost to the nation.¹ For the disability community, this is an old song: both before and after the adoption of the ADA, this community has heard that it is difficult to provide access, that more will be accomplished without government intervention; or, that nothing can be done so government should tread lightly ... etc. etc. A short visit to the Department of Justice ADA compliance website suggests that there is nothing novel about the claims being raised here, and nothing unique about the burdens that are

¹ See, e.g., *Strategic Policy Research Evaluation of the Access Board's Accessibility Guidelines*.

being placed on the telecommunications industry that would justify reading the requirements of Section 255 narrowly.

To the contrary, the telecommunications industry is now being asked to undertake an effort that many other industries undertook over a decade ago. The ADA recognized (among other things) that, as a simple matter of equity, public places had to be accessible to people with disabilities. In 1996, Congress extended the goals embodied in the ADA by recognizing that the telecommunications revolution had brought about a new type of public space: a virtual sphere to which access was just as critical as any physical structure. It is to the telecommunications industry's credit that this sphere has been created; but it is now the industry's responsibility --and the responsibility of the Commission -- to ensure that this sphere is accessible. While the prospect of requiring industry to achieve accessibility might seem frightening at this juncture, the AFB's experience with the ADA is a simple one: if the Commission requires accessibility, and makes it clear that it will move strongly to respond to complaints, access will be provided. If the Commission is unclear in its direction, industry will be encouraged to devote its efforts to legal avoidance rather than practical compliance. As AFB pointed out in its initial comments, this requires the Commission to look to the future, and to read Section 255 broadly, and not narrowly. And, it requires both the industry and disability community to recognize that accessibility and usability for people with disabilities is evolving and will improve as research, technical expertise and production methods begin to put a proper focus on the needs of these too long neglected consumers.

Many commenters alluded to advances in accessibility for people with disabilities brought about through the operation of a competitive marketplace.² While we appreciate the enormous advances made in telecommunications and information technology, and the degree to which many of those advances have, at least indirectly, benefited people with disabilities, we do

² *TIA Comments* at 2-3; *CEMA Comments* at 13; *Multimedia Telecommunications Association ("MTA") Comments* at 10, 12.

point out that the competitive marketplace has not ensured access for people who are blind or visually impaired. Modern telecommunications products are highly dependent on visual displays and rarely, if ever, provide audio output of the information shown on the visual display.

Indeed, many of the visual displays themselves are inaccessible to people with impaired vision because they are not sufficiently well-lit or customizable in terms of font size, contrast, character size etc. Increasingly, telecommunications devices employ touchscreens rather than tactually discernible, keys for input and control. While touchscreens are not necessarily impossible to make accessible for people who are blind or visually impaired, well-designed audio feedback is necessary to accomplish this accessibility.. Finally, although it is possible to design telecommunications products with communications ports to enable access by people with disabilities to a product's input and output via specialized, assistive technology, commercial devices rarely, if ever, include such ports or capabilities..

We are pleased to see some positive developments such as a greater effort by industry to provide accessible user manuals and other information in alternate formats. In addition, companies are beginning to seek opportunities to work with knowledgeable consumers who are blind or visually impaired and with knowledgeable organizations serving this population. However, in reviewing the comments in this docket, it is perhaps most important that the Commission keep in mind a recent quote from a case involving access to a sports stadium. In that case, the stadium owner and designer complained that they were being expected to consider design issues in an entirely different way than they had addressed those issues before. The court noted:

It is no answer to say this is the way we've always done it -- we've always discriminated against persons with disabilities. A prudent designer would have understood that, in enacting the ADA, Congress intended to do more than to simply maintain the status quo. Congress intended to establish higher standards for newly constructed structures, and to change the manner in which buildings were designed so that persons with disabilities could more fully share in the benefits that are available from public accommodations. Had Congress been satisfied with the status quo, there would have been no point in enacting the ADA.